MOTION FILED

MAY 5 - 2005

(4)

No. 04-1329

IN THE

Supreme Court of the United States

ILLINOIS TOOL WORKS INC. AND TRIDENT, INC.,
Petitioners,

v.

INDEPENDENT INK, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Supreme Court Rule 37.2(b), Pfizer Inc. ("Pfizer") respectfully moves for leave to file the attached *amicus curiae* brief in favor of granting the petition for a writ of *certiorari*.

Pfizer is the world's largest research-based pharmaceutical company. New pharmaceuticals are routinely protected by patent, and their effective distribution involves the licensing of those patent rights. Pharmaceutical licensing arrangements take myriad forms, reflecting the wide variety in business circumstances associated with different drugs. Pfizer has extensive experience with patent licensing and the commercial need for flexibility and predictability in intellectual property law.

The segment of the nation's economy that involves intellectual property rights is large and rapidly growing. Royalty income in the United States has been estimated at $110 billion annually. K. Rivette and D. Klein, *Discovering New Value in Intellectual Property*, 78 Harvard Business Review 59 (2000). This licensing supports broad distribution of technology, crucial both to today's economy and to further technological advances. Licensing rates are estimated to range in most instances from 1%-5% of the gross sales of the related goods or services. *Id.*

Pfizer's business, like the business of all firms whose work involves products and services protected by intellectual property rights, depends upon the existence of a robust, rational, and predictable system of intellectual property law. Pfizer seeks to advise the Court about how the Federal Circuit's decision implicates far more than the immediate facts of the case and interests of the parties. As a third party with a strong interest in the law of patent licensing, Pfizer is well-positioned to describe how, as a practical matter, the decision below will obstruct the efficient distribution of pharmaceuticals as well as burden and distort patent licensing generally.

Pfizer sought consent to file an *amicus curiae* brief from the counsel of record for all parties, pursuant to Supreme Court Rule 37.2(a). Counsel for petitioners Illinois Tool Works Inc. and Trident, Inc., defendants in the case below, consented. Counsel for respondent Independent Ink, Inc. refused consent. Copies of correspondence reflecting the consent and refusal of the respective parties are being filed with the Clerk.

Accordingly, Pfizer respectfully requests that the Court grant its motion for leave to file the attached *amicus curiae* brief.

Respectfully submitted,

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QUESTION PRESENTED

Amicus Pfizer Inc. will address: Whether a plaintiff alleging unlawful tying of a non-patented product to a patented one under § 1 of the Sherman Act, 15 U.S.C. § 1, carries the initial burden of proving the defendant has power in the relevant market in which the tying product competes, as he would in a case alleging monopolization under Section 2 of the Sherman Act, 15 U.S.C. § 2, or may initially rely instead on a presumption that the defendant has power in a one-product "market" defined by the scope of the patent?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
INTEREST OF *AMICUS CURIAE*	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
REASONS FOR GRANTING CERTIORARI	3
I. THE FEDERAL CIRCUIT'S DECISION THREATENS THE EFFICIENT EXPLOITATION OF PATENTS, CRITICAL TO TODAY'S ECONOMY	3
A. Intellectual property has substantial commercial importance	3
B. Patent licensing is critical to introduction of new medicines	4
C. The Federal Circuit decision will reduce licensing flexibility and predictability	4
D. The Federal Circuit decision will create confusion in the law, increasing patent litigation	5
II. THE BASIS FOR THE PRESUMPTION—THE NOTION THAT A PATENT IS LIKELY TO CONVEY MARKET POWER—IS NOW WIDELY RECOGNIZED AS WRONG	6
A. There is no justification for use of a patent-based presumption of market power	6
B. Many authorities have rejected use of a patent-based presumption of market power	7
a. This Court emphatically rejected use of a patent-based market presumption in cases brought under Section 2 of the Sherman Act	7

TABLE OF CONTENTS—Continued

	Page
b. This Court has never definitively held that a patent conveys market power	7
c. Many lower courts have criticized the patent-based market power presumption	8
d. The Federal Circuit has rejected the presumption in Sherman § 2 cases	9
e. Congress rejected use of a patent-based presumption of market power in tying misuse cases	9
(i) It is anomalous for antitrust to judge tying under a stricter standard than misuse	9
f. The enforcement agencies formally reject use of a patent-based presumption of market power	10
g. Leading scholars reject use of a patent-based presumption	10
h. The analysis adopted in the modern antitrust jurisprudence of this Court conflicts with a patent-based presumption of market power	11
III. THIS CASE IS AN EXCELLENT VEHICLE FOR CONSIDERATION OF THE PATENT-BASED PRESUMPTION OF MARKET POWER	11
CONCLUSION	13

TABLE OF AUTHORITIES

CASES

	Page
Abbott Laboratories v. Brennan, 952 F.2d 1346 (Fed. Cir. 1991)	9
Albrecht v. Herald Co., 390 U.S. 145 (1968)	13
Brooke Group v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993)	11
Data Gen'l Corp. v. Digidyne Corp., 473 U.S. 908 (1985)	8
Digidyne Corp. v. Data General Corp., 734 F.2d 1336 (9th Cir. 1984)	12
Hohn v. United States, 524 U.S. 236 (1998)	12
In Re Independent Service Organizations Antitrust Litigation, 203 F.3d 1322 (Fed. Cir. 2000)	9
International Salt Co. v. United States, 332 U.S. 392 (1947)	7
Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2 (1984)	6, 8
Nobel Scientific Industries v. Beckman Instruments, 670 F. Supp. 1313 (D. Md. 1986)	8
Nobelpharma AB v. Implant Innovations, Inc., 141 F.3d 1059 (Fed. Cir. 1998)	11, 12
Northern Pac. Ry. v. United States, 356 U.S. 1 (1958)	7
Rockbit Industries U.S.A., Inc. v. Baker Hughes, Inc., 802 F. Supp. 1544 (S.D. Tex. 1991)	8
Schering-Plough Corp. v. FTC, No. 04-106688 (11th Cir. 2005), *available at* http://www.ca11.uscourts.gov/opinions/ops/200410688.pdf	5
SCM Corp. v. Xerox Corp., 645 F.2d 1195 (2d Cir. 1981)	8
Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447 (1993)	11

TABLE OF AUTHORITIES—Continued

	Page
State Oil Co. v. Khan, 522 U.S. 3 (1997)	11, 12, 13
United States v. Loew's, Inc., 371 U.S. 38 (1962)	8
United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001)	10
United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610 (1977)	6
USM Corp. v. SPS Technologies, Inc., 694 F.2d 505 (7th Cir. 1982)	8
Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, 124 S. Ct. 872 (2004)	11
Virginia Panel Corp. v. MAC Panel Co., 133 F.3d 860 (Fed. Cir. 1997)	10
Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1965)	7, 11

STATUTES

Intellectual Property Antitrust Protection Act, 35 U.S.C. § 271(d)(5)	9
Sherman Act, 15 U.S.C. § 1	i, 2, 5, 7
Sherman Act, 15 U.S.C. § 2	i, 7, 9

OTHER AUTHORITIES

P. Areeda, H. Hovenkamp, and E. Elhauge, 10 Antitrust Law, 83 (2d ed. 2001)	9, 10
W.F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 Tex. L. Rev. 661 (1982)	12
Department of Justice/Federal Trade Commission Antitrust Guidelines for the Licensing of Intellectual Property §§ 2.3, 5.3 (1995)	4, 10

TABLE OF AUTHORITIES—Continued

	Page
J. A. DiMasi, R. W. Hanse, and H. G. Grabowski, *The Price of Innovation: New Estimates of Drug Development Costs*, 2003 Journal of Health Economics, No. 2	4
J. Finkelstein, Pharmacy Benefit Managers a Growing Force in Medicare, Amednews.com (August 2, 2004), *available at* http://www.ama-assn.org/amednews/	6
H. Hovenkamp, Federal Antitrust Policy § 10.3 (2d ed. 1999)	10
Statement of Joel I. Klein Before the Committee on the Judiciary, U.S. House of Representatives, Concerning H.R. 2674, *available at* 1996 WL 253568 (May 14, 1996)	8, 9
L. Nakamura, *A Trillion Dollars a Year in Intangible Investment and the New Economy*, in J. Hand and B. Lev, ed., *Intangible Assets: Values, Measures, and Risks* 19-47 (2003)	3
Pharmaceutical Research and Manufacturers of America, Pharmaceutical Industry Profile 2005, *available at* http://www.phrma.org/publications/publications//2005-03-17.1143.pdf	3
R. Posner, Antitrust Law 197-98 (2d ed. 2001)	10
K. Rivette and D. Klein, *Discovering New Value in Intellectual Property*, 78 Harvard Business Review 59 (2000)	4

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BRIEF FOR *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE* [1]

Amicus Pfizer Inc. is the world's largest research-based pharmaceutical company. It discovers, develops, manufactures, and markets leading prescription medicines for humans and animals, enabling them to enjoy longer, healthier, and more productive lives. An effective system of intellectual property protection is essential to Pfizer's work.

[1] No one other than Pfizer Inc. wrote this brief in whole or in part, or made any monetary contribution to its preparation. The written consent of Illinois Tool Works Inc. and Trident, Inc., to the filing of this brief and the refusal of consent by Independent Ink, Inc., along with a motion for leave to file, are being filed with the Clerk herewith.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Federal Circuit purported to follow dated Supreme Court precedent in holding that a plaintiff alleging the tying of one product to another, patented one under § 1 of the Sherman Act can meet its initial burden with respect to the first element of its claim—market power in the tying product—by relying on a rebuttable presumption that a patent conveys market power.[2] Pet. App. 14a. The presumption has two related components: a patented good is presumed to constitute a market by itself, immune from competition from other patented and non-patented goods; and the patentee is presumed to hold power in that one-product market. There is no justification for either aspect of this presumption.

Pharmaceutical companies, including *amicus* Pfizer, invest billions of dollars in the research and development of new medical treatments. Yet pharmaceutical firms are only one component, albeit one of the largest, of the growing portion of the nation's economy that is devoted to the development of new technology. These businesses require a rational and predictable system for the protection of intellectual property.

The legal consequences of a patent with respect to market definition and market power issues in an antitrust case have proved anything but predictable. This Court's statements have been inconsistent, at least in connection with cases arising under § 1 of the Sherman Act. Many lower courts, mindful of the absence of any justification for the presumption, have expressed their disagreement with it in dicta. The presumption has also been condemned by scholars and rejected by the enforcement agencies and by Congress (in the context of patent misuse). Given the breadth and consistency of the criticism, many considered the presumption obsolete. Now the Federal Circuit has resurrected it.

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[2] The court did not apply the presumption to the monopolization claim under 15 U.S.C. § 2. Pet. App. 18a.

If the decision below is left standing, it will create a roadblock to the efficient use of intellectual property, which is the lifeblood of pharmaceutical research, and it will obstruct the efficient distribution of pharmaceuticals, critical to effective medical care. It will also generate years of litigation over how it is to be applied in practice. As it has in the past, this Court should grant certiorari and reverse in order to ensure that precedent based on obsolete and possibly misinterpreted reasoning does not deter efficient and pro-competitive business conduct, including the research, development, and efficient marketing of new medical technologies.

REASONS FOR GRANTING CERTIORARI

I. THE FEDERAL CIRCUIT'S DECISION THREATENS THE EFFICIENT EXPLOITATION OF PATENTS, CRITICAL TO TODAY'S ECONOMY

A. Intellectual property has substantial commercial importance

The Federal Circuit's decision will ripple through the intellectual property-based segments of the nation's economy. The scope of this commerce is vast and growing. Investment in research and development was estimated at $1 trillion in 2000, rivaling corporate investment in physical assets in that year. L. Nakamura, *A Trillion Dollars a Year in Intangible Investment and the New Economy*, in J. Hand and B. Lev, ed., *Intangible Assets: Values, Measures, and Risks* 19-47 (2003). Investment in research and development in pharmaceuticals alone was estimated at $49.3 billion in 2004. Pharmaceutical Research and Manufacturers of America, Pharmaceutical Industry Profile 2005, *available at* http://www. phrma.org/publications/publications//2005-03-17.1143.pdf.

Royalty income from patent licensing is estimated at $110 billion annually in the United States. K. Rivette and D. Klein, *Discovering New Value in Intellectual Property*, 78 Harvard Business Review 59 (2000). This is only a fraction of the value of the broad distribution of technology that licensing promotes. Licensing rates are estimated at 1% - 5% of the gross sales of the related goods or services. *Id.*

B. Patent licensing is critical to introduction of new medicines

Owners of the rights to new pharmaceutical compounds often lack the resources necessary for the drug development and approval process, estimated to cost over $800 million on average per launched drug, fully capitalized. J. A. DiMasi, R. W. Hanse, and H. G. Grabowski, *The Price of Innovation: New Estimates of Drug Development Costs*, 2003 Journal of Health Economics, No. 2 at 166. Many patent owners must partner with other companies to gain access to the requisite resources and expertise. Licensing is procompetitive because it provides the mechanism for this marriage of complementary assets. *See* Department of Justice/Federal Trade Commission Antitrust Guidelines for the Licensing of Intellectual Property § 2.3 (1995) ("DOJ/FTC Guidelines").

C. The Federal Circuit decision will reduce licensing flexibility and predictability

Pharmaceutical firms today employ a wide variety of licensing arrangements to distribute their technology, particularly in connection with joint efforts in which one company contributes its research and development and another contributes its marketing and related expertise. Flexibility is key to developing the best licensing arrangement for a particular business need. In these and other arrangements, efficiency often counsels the bundling of more than one patent in a single license. The decision below,

however, will increase the antitrust risk in those arrangements. Moreover, uncertainty about how the courts will apply *Independent Ink* will further constrain licensing approaches, since firms value predictability. This will adversely impact the efficient distribution of intellectual property rights and in turn the research and development of patentable pharmaceutical technology.

D. The Federal Circuit decision will create confusion in the law, increasing patent litigation

The Federal Circuit's decision raises myriad questions about how it should be applied in practice. Will the presumption be applied in cases of patent bundling, an issue of particular concern to pharmaceutical firms? In tying cases under § 1 of the Sherman Act, will the presumption apply to the market for the tied product if patented? Will lower courts limit the presumption to tying claims, or will its use spill over into other types of antitrust claims, especially where a tying claim is combined with other antitrust allegations and tried to a jury? How will courts deal with the possibility of inconsistent outcomes in a single case, where a judge is the factfinder with respect to tying misuse and a jury is the factfinder with respect to antitrust claims?

Patent litigation already costs some $1 billion annually, and the decision below will increase that figure. *See Schering-Plough Corp. v. FTC*, No. 04-10688 (11th Cir. 2005), *available at* http://www.ca11.uscourts.gov/opinions/ops/200410688.pdf, *citing* S. Carlson, *Patent Pools and the Antitrust Dilemma*, 16 Yale L. Reg. 359, 380 (1999). Years of litigation will be needed to resolve the questions it raises.

II. THE BASIS FOR THE PRESUMPTION—THE NOTION THAT A PATENT IS LIKELY TO CONVEY MARKET POWER—IS NOW WIDELY RECOGNIZED AS WRONG

A. There is no justification for use of a patent-based presumption of market power

In assessing tying arrangements of all kinds, antitrust analysis begins by determining if the seller has sufficient leverage to coerce the buyer into accepting terms it would reject if it could. *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984). *Fortner II* established the importance of not condemning a tying arrangement without first confirming that the seller in fact has leverage over the buyer. *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610 (1977).

In the pharmaceutical industry, patented goods are seldom sufficiently unique to command market power. Almost all patented products compete with other patented products. In many cases, they face competition from generic products as well for meeting particular medical needs. Indeed, pharmacy benefit managers devote considerable effort to exploiting this competition. Pharmacy benefit managers project that through drug interchange they will save $ 6.9 billion in drug costs in 2005, a figure that reflects both substitution of generics for patented drugs and competition among patented drugs. J. Finkelstein, Pharmacy Benefit Managers a Growing Force in Medicare, Amednews.com (Aug. 2, 2004), *available at* http://www.ama-assn.org/amednews/. The latter savings are proof of healthy competition among patented products and the fallacy in presuming, even subject to rebuttal, that such competition does not exist.

B. Many authorities have rejected use of a patent-based presumption of market power

a. *This Court emphatically rejected use of a patent-based market power presumption in cases brought under Section 2 of the Sherman Act.*

In *Walker Process*, a case brought under § 2 of the Sherman Act, this Court stated clearly that a patent does not automatically confer market power. *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177-78 (1965) (a patented device may "not comprise a relevant market. There may be effective substitutes for the device . . ."). Yet the decision below applies the opposite approach, on the grounds that that case arises under a different section of the statute, 15 U.S.C. § 1. This is a distinction without a difference. There is no reason to define antitrust markets and evaluate antitrust market power under different standards under § 1 and § 2 of the Sherman Act, both of which require application of the same type of fact-based economic analysis.

b. *This Court has never definitively held that a patent conveys market power.*

In 1947, this Court held that a tying agreement involving a patented good was anticompetitive. *International Salt Co. v. United States*, 332 U.S. 392 (1947). That decision, however, did not discuss whether the tying product had market power; the case turned instead on other issues, including whether pricing provisions relating to the tied good saved the agreement. When it did address the issue, in 1958, this Court found no reason to presume market power from a patent. *Northern Pac. Ry. v. United States*, 356 U.S. 1, 10 n.8 (1958) ("Of course it is common knowledge that a patent does not always confer a monopoly over a particular commodity. Often the patent is limited to a unique form or improvement of the product and the economic power resulting from the

patent privileges is slight."). Nevertheless, in *United States v. Loew's, Inc.*, a copyright case, the Court claimed to discover in *International Salt* a holding that a patent should be presumed to convey market power. 371 U.S. 38 (1962). *Loew's* claims for *International Salt* much that the 1947 Court never said about patents and market power.

While the Court again expressed support for the presumption in dicta in Jefferson Parish, some Justices thoughtfully articulated their disagreement. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984) (opinion of the Court); *Jefferson Parish* at 37, concurring opinion of O'Connor, J, joined by Burger, C.J., and Powell and Rehnquist, J.J. ("a patent holder has no market power in any relevant market if there are close substitutes for the patented product"); *see also Data Gen'l Corp. v. Digidyne Corp.*, 473 U.S. 908 (1985) (dissent from denial of certiorari).

c. *Many lower courts have criticized the patent-based market power presumption.*

Many lower circuits have criticized the presumption in dicta. *See, e.g., USM Corp. v. SPS Technologies, Inc.*, 694 F.2d 505, 511 (7th Cir. 1982) (dicta) (Posner, J.) ("of course, not every patent confers market power"); *SCM Corp. v. Xerox Corp.*, 645 F.2d 1195, 1203 (2d Cir. 1981) (dicta) ("When the patented product, as is often the case, represents merely one of many products that effectively compete in a given product market, few antitrust problems arise."); *Rockbit Industries U.S.A., Inc. v. Baker Hughes, Inc.*, 802 F. Supp. 1544, 1550 (S.D. Tex. 1991); *Nobel Scientific Industries v. Beckman Instruments*, 670 F. Supp. 1313, 1329, (D. Md. 1986), *aff'd*, 831 F.2d 537 (4th Cir. 1987) (dicta). Given this judicial sentiment, a Justice Department official testified in 1996 that because the courts were abandoning the presumption, statutory reform to eliminate it was unnecessary. Statement of Joel I. Klein Before the Committee on the Judiciary, U.S.

House of Representatives, Concerning H.R. 2674, *available at* 1996 WL 253568 (May 14, 1996) ("House Judiciary Statement of Joel Klein").

d. *The Federal Circuit has rejected the presumption in Sherman § 2 cases.*

The Federal Circuit in this case made no secret of its skepticism about the presumption, basing its decision solely on what it believed to be the force of precedent. Pet. App. 14a. In earlier cases involving § 2 of the Sherman Act, it rejected the presumption. *In re Independent Service Organizations Antitrust Litigation*, 203 F.3d 1322, 1325 (Fed. Cir. 2000) ("A patent alone does not demonstrate market power."); *Abbott Laboratories v. Brennan*, 952 F.2d 1346, 1354 (Fed. Cir. 1991) ("A patent does not of itself establish a presumption of market power in the antitrust sense.")

e. *Congress rejected use of a patent-based presumption of market power in tying misuse cases.*

The decision below also conflicts with principles underlying the 1988 amendments to the Patent Act. There Congress recognized both that there is no basis for a presumption that a patent conveys market power and that tying can be efficient. It prohibited use of a market-power presumption in litigation of misuse claims based on tying. 35 U.S.C. § 271(d)(5).

(i) It is anomalous for antitrust to judge tying under a stricter standard than misuse.

It has been argued that the 1988 Patent Act amendments "effectively abolish[]" the presumption, since it defies common sense for antitrust law to view tying in a patent license under a stricter standard, and one less consistent with contemporary analysis, than does misuse law. P. Areeda, H. Hovenkamp, and E. Elhauge, 10 Antitrust Law ¶ 1737c at 83 (2d ed. 2001). Recognizing that antitrust, as a more

general legal scheme, should not be more onerous than the more specific law of misuse, the Federal Circuit itself previously concluded that conduct involving intellectual property that does not amount to patent misuse cannot be an antitrust violation. *Virginia Panel Corp. v. MAC Panel Co.*, 133 F.3d 860 (Fed. Cir. 1997). The decision below conflicts with that holding.

f. *The enforcement agencies formally reject use of a patent-based presumption of market power.*

The federal enforcement agencies have for a decade opposed use of a patent-based presumption. They have so stated in formal guidelines. DOJ/FTC Guidelines § 5.3. And in prosecuting antitrust violations involving intellectual property, the government has consistently undertaken to prove market power without reliance on a presumption. *See, e.g., United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

g. *Leading scholars reject use of a patent-based presumption.*

Leading legal commentators also criticize use of a presumption. Areeda, Hovenkamp, and Elhauge, 10 Antitrust Law ¶ 1737c at 83; *see also* H. Hovenkamp, Federal Antitrust Policy § 10.3 (2d ed. 1999) ("most patents confer absolutely no market power on their owners"). In his nonjudicial writings, Judge Richard Posner has observed that "a patent is a poor proxy for monopoly power, since most patents confer too little monopoly power to be a proper object of antitrust concern." Antitrust Law 197-98 (2d ed. 2001).

h. *The analysis adopted in the modern antitrust jurisprudence of this Court conflicts with a patent-based presumption of market power.*

Numerous modern holdings of this Court are inconsistent in approach with the decision below. In its antitrust decisions over the past half-century, this Court has moved steadily toward a more fact-based and economically disciplined inquiry into market definition and market power, an approach inconsistent with presumptions about market definition and power. Beginning at least with *Walker Process* in 1965—a patent-related case—this Court has emphasized the importance of economically sound analysis, grounded in hard evidence, in deciding antitrust cases. *Walker Process*, 382 U.S. 172. Such analysis is necessarily based on careful market definition. ("Without a definition of that market there is no way to measure Food Machinery's ability to lessen or destroy competition."). *Id.* The Court continues to employ an economically sound approach. *See, e.g., Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 124 S. Ct. 872 (2004); *State Oil Co. v. Khan*, 522 U.S. 3 (1997); *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993). These decisions rely on evidence, not ill-founded presumptions, about markets and competition.

III. THIS CASE IS AN EXCELLENT VEHICLE FOR CONSIDERATION OF THE PATENT-BASED PRESUMPTION OF MARKET POWER

Unless the Court accepts this case for review, the presumption will likely survive, fostering meritless litigation and interfering with efficient licensing, until this Court accepts another case presenting the issue. Further substantive analysis of the presumption in the courts below is unlikely. Many cases involving the presumption will be litigated before the Federal Circuit, given its broad jurisdiction over patent cases. *Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059

(Fed. Cir. 1998). Even should the regional circuits hear such a case, they may well follow the Federal Circuit's lead. *See, e.g., Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336 (9th Cir. 1984). Moreover, future litigation on this issue is likely to be sparse, since many licensors will simply forgo tying arrangements. Many other licensors will settle quickly if sued. Thus, the harm inflicted by the decision below will continue with few future opportunities for the Court to correct it.

Resort to a Congressional fix would be unwise. As leading enforcement officials have pointed out, one enduring strength of the antitrust laws is that they can be adapted by the judiciary to reflect changes in economic learning and business practices. W. F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 Tex. L. Rev. 661, 670 (1982) ("An adaptive approach to antitrust law is necessary both because of the diversity and rapidly changing nature of the business conduct to be scrutinized, and because of the continuing progress of economic theory in explaining why firms pursue certain strategies and the competitive consequences of their behavior."); *see also* House Judiciary Statement of Joel Klein. Reliance on targeted statutes to correct anomalies in the law would restrict antitrust's essential adaptability. The problem here is judicially created, and it is best solved judicially.

This Court has appropriately reserved to itself, as the nation's highest court, the sole right to overrule its own precedent. *State Oil v. Khan*, 522 U.S. at 20; *Hohn v. United States*, 524 U.S. 236, 252-53 (1998). A necessary consequence, however, is the obligation for this Court to accept an opportunity to correct older holdings, or their misinterpretation by lower courts, once it is clear that those holdings or interpretations are needlessly fostering litigation, with adverse effects on the marketplace.

The Court faced a similar situation in *Khan*, where decades-old case law condemned maximum resale price fixing as *per se* illegal although there was no recognized basis for such treatment. 522 U.S. 3 (overruling *Albrecht v. Herald Co.*, 390 U.S. 145 (1968)). There the court of appeals, while disagreeing with the result, was bound by Supreme Court precedent to apply the *per se* rule. This Court granted certiorari and reversed, holding that maximum resale price maintenance should be judged under the rule of reason.

Independent Ink poses a single issue: the validity of a presumption that a patented product dominates a market consisting of that product alone. The case has an extensive summary-judgment record that would facilitate the Court's review. There is unlikely to be an equally attractive vehicle for addressing the outmoded and destructive market-power presumption for many years to come.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision of the Federal Circuit reversed.

Respectfully submitted,

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